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THE GUARANTY OF PROMISSORY NOTES.

In the February number of the Law Reporter (ante, p. 541), we discussed the guaranty of promissory notes. We now propose to inquire into the application of the Statute of Frauds to contracts of this kind.

The fourth section of that statute (29 Car. 2, c. 3, § 4), so much of it, at least, as relates to guaranties, declares that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith. In applying this enactment to guaranties of promissory notes, two questions arise.

I. What limitations exist to the operation of the statute? In *Forth* v. *Stanton* (1 Wm. Saunders, 211 *a*), it is said, if the promise to pay the debt of another be founded on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is considered as an original promise, and not within the statute.[1] Upon what grounds does this limitation of the statute of frauds rest?

Three cases are cited by Serjeant Williams in support of the rule he laid down. The first is *Read* v. *Nash*, (1 Wils. 305.) In this case the plaintiff's testator brought an action of assault and battery against one Johnson, and the defendant, being present, promised to pay the testator,

[1] See also *Leonard* v. *Vredenburgh*, (8 John. 29.)

if he would not proceed to trial, the sum of £50 and costs; whereupon the testator withdrew his record. It was held, that the promise was not within the statute; that the withdrawal of the record at the defendant's request was a sufficient consideration, and the plaintiff recovered as upon an original undertaking of the defendant. The decision of the court, however, went upon the ground, that it did not appear that there had been any default or miscarriage on the part of Johnson, for if he had proceeded to trial he might have obtained a verdict in his favor. The next case cited by Williams is *Stephens* v. *Squire*, (5 Mod. 205.) There a suit had been brought against the defendant and two others for appearing for the plaintiff without a warrant of attorney, and the defendant promised the plaintiff if he would not prosecute the action to pay £10 and costs, and the defendant's undertaking was held not within the statute.[1]

The third case is *Williams* v. *Leper*, (3 Burr. 1886.) One Taylor, a tenant of the plaintiff, being in arrear for rent to the amount of £45, and insolvent, assigned his property for the benefit of his creditors. They employed the defendant to sell the effects. On the morning advertised for the sale, the plaintiff came to distrain the goods in the house, and defendant promised to pay the arrears of rent if he would desist from distraining. And the plaintiff did thereupon desist. The court held, that the statute of frauds had nothing to do with this case.

These cases are the earliest we have been able to find, in which the principle under discussion is distinctly announced. They have been followed and confirmed by numerous decisions.[2] Without entering into any detailed examination of them all, we pass to three judgments recently pronounced in the courts of the State of New York, in which the rule stated in Saunders is laid down.

Johnson v. *Gilbert* (4 Hill, 179), is the first in order. This was an action upon the guaranty of the payment of a promissory note, which was transferred to the plaintiff in payment of a debt due to him from the defendant. On the trial the plaintiff was nonsuited, upon the ground that the guaranty was void, within the statute of frauds, inasmuch

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1 Vide *Loomis* v. *Newhall*, (15 Pick. 159.)

2 Chit. Con. 503, &c.; 5 Mass. 538; 3 Met. 398; 10 New Hamp. 32; 4 Cow. 432.

as the consideration therefor was no where expressed in it. Error was brought, and the Supreme Court, reversing the judgment, held that the statute of frauds had nothing to do with the case. *Brown* v. *Curtis*, (2 Coms. 225,) was shortly afterwards decided upon the same principles. Upon the trial of this cause the plaintiff gave in evidence a promissory note made by A., and payable to B. the defendant, or bearer. He also proved that the defendant transferred the note to him in exchange for another note, which the plaintiff held against him for borrowed money. When the transfer was made, the plaintiff said to the defendant, "I know nothing of the maker's circumstances, but if you will guaranty the note I will take it." The defendant thereupon indorsed the following guaranty upon the note — "I guaranty the payment of the within." The Court of Appeals, on error brought from the Supreme Court, held that the guaranty was not within the statute of frauds.

In the same volume of Comstock's Reports, is a similar case, that of *Durham* v. *Manrow*. On the trial of this cause, it was shown that A. made a note, payable to B. or bearer; that B. & C. long after the note was made indorsed the following guaranty thereon — "We guaranty the payment of the within note;" that the defendant B. was the payee of the note, and that he bought a horse of the plaintiff on the day the guaranty was dated, and in part payment therefor transferred to him the note with the guaranty indorsed thereon, C. signing the guaranty at B.'s request and as his surety. In the Supreme Court (3 Hill, 584), the undertaking of B. & C. was held by the court, Justice Bronson dissenting, to be a promissory note, and therefore not within the statute of frauds. The Court of Appeals affirmed the judgment of the Supreme Court, but on entirely different grounds. It held, that the undertaking of B. & C. was original, and was for the payment, in a particular way, of B.'s own debt, and that therefore it was not within the statute.

Some remarks upon the cases we have just cited may be appropriate in this connection.

(1.) *Read* v. *Nash* (1 Wils. 305), *Williams* v. *Leper* (3 Burr. 1886), are not by any means coincident, as Serg. Williams seems to think. In the former case, the judgment of the court went upon the ground that there appeared to be no default or miscarriage on the part of Johnson. In the latter a debt did exist against Taylor, the insolvent

debtor. In the one instance, therefore, the undertaking of the defendant could not possibly have been a guaranty, while in the other it might well have been a promise to pay the debt of another. This circumstance makes *Williams* v. *Leper* much the stronger of the two cases.

(2.) It must be remarked, that the three decisions to which Williams refers in 1 Saund. 215*a*, are not instances of guaranties at all. They were not promises to pay the debts of other persons, but were independent and original contracts. They did not depend upon any contingency, as a guaranty always does, nor were they even in the form of guaranties. They were absolute promises to pay, and if they had been reduced to writing would have been promissory notes. The statute of frauds, therefore, had nothing to do with them. These cases themselves, then, are not authorities for the rule for whose support they are generally cited, that, wherever the promise to pay the debt of another arises out of some new and original consideration of harm or benefit moving between the newly contracting parties, the guaranty is not within the statute.

Read v. *Nash*, and similar cases, differ accordingly, from the cases we have taken from the New York Reports, in an important particular. The former are not instances of guaranties, either in form or in fact, the latter whatever they are, are in the form of guaranties. Every one who reads the undertaking of the defendant in *Johnson* v. *Gilbert*, "I guaranty the payment of the within note," must say, that this is a promise to pay the debt of another. But no such contract appears in *Williams* v. *Leper*. In that case, the defendant makes an absolute promise to pay a certain sum.

(3.) Granting, that, in the case of *Durham* v. *Manrow*, the guaranty of B. was in fact an agreement to pay his own debt, but it is not clear that C.'s undertaking was such an agreement, and therefore out of the statute. Indeed, whether the principle laid down by the court, that a guaranty, although not expressing in terms any consideration, when given towards payment of the individual debt of the guarantor is valid, be correct or not, we cannot help believing, that it mistook the real state of the case, when it declared that C., the joint guarantor with B., undertook in his guaranty to pay his own debt. There is no evidence to sustain this assumption. C. appears to have signed the guaranty only at B.'s request, and it is not

shown that he had any knowledge of the position in which A. and B. stood. So far as he was concerned, why was not the guaranty entirely without consideration, and therefore void? and if it was void as to him, his contract being joint with B., ought to have been held void as to the latter also.[1]

The reasons by which the court justifies its construction of C.'s contract, are unsatisfactory. "It appears," says Justice Strong, "from the testimony, that at the time of the sale of the horse by the plaintiff to B., C. and B. gave the note of A. in payment after indorsing their joint guaranty. Therefore the inference is, that this method of securing the payment of the purchase-money was included in and formed part of the bargain for the horse, and adopted with the consent of C. Granting that this is a fair inference to be drawn from the transaction, how can it affect the nature of C.'s guaranty? He was simply a promisor to pay the debt, not of himself, but of another. His relation to the plaintiff was different from that of B. Could the defendant ever have sued C., so far as appears from the case, for the purchase-money of the horse sold to B.? and if he could not have held C., how can it be said that the guaranty of the latter was an undertaking to pay his own debt?

The rule under discussion, however, in spite of the objections which may be urged to some of the cases which support it, is too well founded in authority to be disputed. Let us inquire into the principle upon which it rests.

It has been said, that the undertakings of the defendants in *Johnson* v. *Gilbert*, and in similar cases, were not within the statute of frauds, because they were not guaranties. This is an error. In the previous article we showed that the words "I guaranty" create a contract of guaranty, and not a promissory note. The agreements therefore, in the cases to which we have just referred, were guaranties; were, in form at least, promises to pay the debts of third persons. They cannot, of course, be altered or contradicted. They must be held to be, what in form they are. By the provisions of the statute, it is only a special agreement to answer for the debt of another which must be put in writing. A special agreement of this sort, if we do not err in our interpretation, includes only those cases, in which the primary and chief design of

[1] *Loomis* v. *Newhall*, (15 Pick. 159.)

the guarantor is to answer for the debt of another. It does not embrace those guaranties which are in fact promises to pay the guarantor's own debts. Wherever the design of the guarantor is primarily to discharge his own liability, his undertaking is not within the purview of the statute of frauds. The object of the statute was to avoid only such promises as are particularly and especially to answer for the liabilities of others, and not those which, while incidentally assuming the responsibility for such debts, are wholly or principally for the purpose of assuming some distinct obligation of the promisor. Upon this ground alone, can the limitation in question be put.[1]

II. We come now to the second part of our inquiry — The construction which is to be put upon the statute. In discussing this subject, we do not propose to enter into an examination of the form of the agreement, or the manner in which it is to be signed within the purview of the statute. These points are well settled.[2] But there has been a great strife concerning the construction of the word agreement in the statute, and to that we pass at once.

The well known case of *Wain* v. *Warlters*, (5 East. 10,) is the leading case upon the subject. The plaintiff here declared upon the guaranty in these words: "Messrs. Wain & Co. I will engage to pay you, by half-past four this day, fifty-six pounds and expenses on bill that amount on Hall. Jno. Warlters. Apl. 30, 1803." The consideration for this engagement was the forbearance on the part of the plaintiffs to bring an action upon a bill accepted by Hall. In an action upon the guaranty, it was objected, that though the promise, which was to pay the debt of another, was in writing, as required by the statute of frauds, yet that it did not express the consideration of the defendant's promise, which was also required by the statute to be in writing. This objection was sustained at Nisi Prius, and afterwards by the judges in banc, and the word agreement in the statute declared to mean a mutual contract on consideration between two or more parties, and not a mere promise or undertaking.

For a time the authority of this decision was doubted, but it was at last confirmed in *Saunders* v. *Wakefield*, (4 Barn. & Ald. 596,) and in *Morley* v. *Boothby*, (3 Bing.

[1] *Durham* v. *Manrow*, (2 Coms. 534.)
[2] *Laythroap* v. *Bryant*, (in 2 Bing. N. C. 744); *Birkmyr* v. *Darnell*, (1 Smith, Leading Cases, 134.)

107.) put beyond question in England. "When the statute of frauds," said Chief Justice Best, in the latter case, "declared that no person should be charged with the debt of another, except on an agreement in writing, if the clause in the statute had not expressed, as I think it does, that the whole agreement should be in writing, the law of evidence would have rendered it necessary that the whole should have been in writing, by declaring, as it uniformly has done, that nothing could be added to the terms expressed in writing by parol testimony. Applying the principles of common law to the statute, which is a safe mode of construing acts of the legislature, I say, as I said in *Saunders* v. *Wakefield*, that, if I had never heard of *Wain* v. *Warlters*, I should have held, that a consideration should appear on the face of the written instrument."

The principle involved in *Wain* v. *Warlters* has not been generally admitted in the United States. It has been denied the force of law in North and South Carolina, in Maine, Vermont, Connecticut, and Massachusetts.[1] In the latter State, Chief Justice Parker, in *Packard* v. *Richardson*, (17 Mass. 122,) entered into an elaborate discussion of the question, and declared, as the result of his investigation, that the authority of *Wain* v. *Warlters* had no binding force in this country.

The circumstance, he argued, that for nearly a hundred years from the time the statute of frauds was enacted in this State in 1692, until the case of *Wain* v. *Warlters* came up for judgment, no one doubted but that a promise, founded on a good consideration to pay the debt of another, was valid, if in writing, although no consideration was expressed in the agreement, — this circumstance is proof that the construction put upon the statute by *Wain* v. *Warlters* is not the true one. A contemporaneous construction is generally the best construction of a statute. It gives the sense of a community of the terms made use of by the legislature. And when the construction has been acquiesced in for so long a time as it has been in this State, it becomes established law, and nothing but legislative power can constitutionally effect a change.

Besides, the statute declares that a memorandum or note of the agreement is sufficient. What is this but to say, that if it appear by a written memorandum or note, signed

[1] U. S. Digest, Art. "Stat. of Frauds."

by the party, that he intends to become answerable for the debt of another, he shall be bound, otherwise not? And how is it possible, with this expression in the statute, to insist upon a formal agreement, containing all the motives or inducements which influenced the party to become bound?

Again, in the case of *Egerton* v. *Matthews*, (6 East, 307,)[1] where the defendant agreed in writing to buy of the plaintiff thirty bales of cotton at 19*d.* a pound, it was decided under the seventeenth section of the statute of frauds, that a memorandum, containing only one side of the bargain, and without any consideration expressed, was sufficient. If the word agreement imports a mutual act of two parties, surely the word bargain is not less significative of the consent of two. And if the technical meaning of the former word made it necessary to insert the consideration in a collateral promise to pay, why not the latter word also, as Lord Ellenborough himself first supposed?

The Chief Justice also drew an argument in favor of his position, from the doubts with which *Wain* v. *Warlters* was at first received.[2]

But, whatever be the authority of *Packard* v. *Richardson*, the Revised Statutes have put the question to rest in Massachusetts, by declaring (c. 74, § 2,) that the consideration of the promise, contract, or agreement need not be set forth in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence. The same construction of the statute prevails, as we have said, in several other States. In some of them, however, the word promise has been substituted for the word agreement, or introduced with it in the re-enactment of the statute of frauds. Where this is the case, in the opinion of Chief Justice Marshall, in *Violett* v. *Patton*, (5 Cranch, 142,) the reasoning upon which *Wain* v. *Warlters* was decided does not apply.[3]

In several States, however, the case of *Wain* v. *Warlters* has been followed, and it now obtains in Maryland and New Jersey.[4] In New York, also, four years after that case was decided in the Court of King's Bench, the principle involved in it was affirmed in *Sears* v. *Brink*, (3 Johns.

[1] There is this difference between *Wain* v. *Warlters* and *Egerton* v. *Matthews*; in the latter case the agreement imported a consideration upon the face of it — in the former, it did not. (17 Mass. 131.)

[2] 14 Ves. jun. 189; *Ex parte Garden*, (15 Ib. 286.)

[3] 2 Smith, Lead. Cas. 156, in marg.

[4] 7 Har. & Johns. 409, 457; U. S. Dig., "Statute of Frauds."

210,) and has since been wrought into the Revised Statutes, (II. p. 195, 3d ed.) In *Sears* v. *Brink*, the action was on an agreement relative to the sale of lands, and the court declared, that the consideration as well as the promise must be in writing, not only because a true construction of the word agreement in the statute required it, but also because the design of the statute itself would otherwise fail. This decision was confirmed in *Leonard* v. *Vredenburgh*, (8 Johns. 29,)[1] and afterwards, as we have just said, the legislature enacted that the agreement, or some note or memorandum thereof expressing the consideration, should be in writing. It will help us in our future inquiries, to notice one or two cases, which have been adjudged since the statute.

In *Smith* v. *Ives*, (15 Wend. 182,) the plaintiff declared on a guaranty, whereby the defendant engaged to guaranty to the plaintiff the eventual payment of a note given by A. to the plaintiff for the sum of $59, and due in February, 1829. In the second count of his declaration, the plaintiff alleged, that being possessed of the note specified in the first count, he, at the request of the defendant, forbore to collect the same of A., and that the defendant on that day, in consideration that the plaintiff would forbear to sue A. on the note, promised, by an indorsement on the note, to pay to plaintiff the amount of the note. The defendant pleaded to this count, that no consideration was expressed in the promise in writing made by the defendant, and to this plea the plaintiff demurred.

After argument upon the demurrer, the court, by Savage, Ch. J., held the plea good under the former statute. But it was also held, that the Revised Statutes, in requiring that the consideration should be expressed in the agreement itself, adopted the principle of *Wain* v. *Warlters* and *Brink* v. *Sears*, and was declaratory of the true construction of the old statute. This case was followed by that of *Packer* v. *Wilson*, (15 Wend. 343.) Here A. made a note payable to B. or bearer, and being over-due, C. indorsed it with the guaranty, "I guaranty the payment of this note." The consideration for this promise was proved to be forbearance on the part of the plaintiff, who held the note, to sue the maker. The court held, that the guaranty was void by the statute, because no consideration was expressed therein. This decision, it is true, was overruled in *Manrow* v. *Dur-*

[1] Vide also *Rogers* v. *Kneeland*, (10 Wend. 250.)

ham, (3 Hill, 585,) upon the ground that the guaranty was a promissory note, and so not within the statute at all. But if this theory is incorrect, as we endeavored to show in the previous article, *Packer* v. *Wilson* necessarily stands unimpeached.

The next case was that of *Hall* v. *Farmer*, (5 Den. 484.) On the trial of this cause, the plaintiff proved that A. made a note, payable to B., the plaintiff, and that C., the defendant, indorsed it, "I guaranty the payment of the within." On the part of the defendant it appeared, that prior to the date of the note, A. was indebted to the plaintiff in a large sum of money, and that he had accounts against him. At the date of the note in question, these parties adjusted their respective demands against each other, finding due to the plaintiff the amount mentioned on the note, and A. agreed to procure the defendant to be his surety for the balance. The defendant was not present at the settlement. After the balance was ascertained, the note and guaranty were made, the defendant then signing the latter at the request of A. After argument, the court held the guaranty to be void. "The engagement," said Chief Justice Beardsley, "of the defendant was a special promise to answer for the debt, default or miscarriage of the guarantied note, and as the written agreement does not express any consideration for the promise, the statute makes it void. This promise is in writing, and so far the statute is complied with. But the statute requires something more, for the consideration of the agreement must be expressed in the writing, which is signed by the party, who is to be thereby charged." With this opinion the Court of Appeals coincided in 2 Coms. 533.[1]

But was not the guaranty, upon which the action in this case was founded, void, without reference to the statute of frauds, inasmuch as it was not founded upon any consideration at all? From all that appears in the report of the case, the guaranty was *nudum pactum*, neither credit given to the maker of the guarantied note, nor forbearance to sue him, nor any other consideration, it would seem, was the basis of the undertaking of the defendant. Was it not then void *ab initio*?[2]

Under the rule of construction of the statute of frauds, which we have been discussing, the question has arisen, What is a sufficient setting forth of the consideration?

[1] Vide 5 Hill, 145, and *Leggett* v. *Raymond*, (6 Ib. 641.)
[2] *Rann* v. *Hughes*, (7 Term Rep. 350, in note.)

It has been held, that it is enough, if it can be gathered by fair inference or necessary implication from the undertaking. In accordance with this ruling, Chief Justice Tindal, in *Newbery* v. *Armstrong*, (4 Car. & Payne, 59,) said it would do, if we could, as it were, spell out the consideration from the agreement.

The Revised Statutes of the State of New York, however, in requiring the expression of the consideration, in the agreement of one person to answer for the debt of another, intended to prevent the practice of gathering the consideration from the guaranty by implication or inference.[1] It is no longer sufficient to spell it out from the agreement. Yet, against the spirit, if not the letter of the Revised Statutes, it has become a well settled rule in New York, that it is a sufficient expression of the consideration to satisfy the statute of frauds, to set forth in the undertaking, that the promise is for value received. In *Watson's Executors* v. *McLaren*, (19 Wend. 363,) Cowen, J., declared these words enough, and repeated his decision in *Douglas* v. *Howland*, (24 Wend. 44.) Chief Justice Kent, on the other hand, declares, that these decisions appear to reduce the statute requisition of the setting forth of the consideration to a mere formality.[2]

Wherever the rule has obtained, it must be remarked here, that the consideration for the promise, no less than the promise itself, must be expressed in a guaranty of the debt of another, one exception has always been made to its operation. If the guaranty is collateral to the note guarantied, but is made at the same time and becomes an essential ground of the credit given to the maker, there need be no other consideration for the guaranty than that moving between him and the creditor. And as a promissory note always imports a consideration, that is enough to satisfy the statute. Upon what authority and principle does this exception rest?

In *Leonard* v. *Vredenburgh*, (8 John. 29,) A. made a promissory note payable to the plaintiff, and C. wrote under it a guaranty in these words, "I guaranty the above." The plaintiff sued C. upon the guaranty, and at the trial offered to prove, that A. applied to him for goods, which he, the plaintiff, refused to sell him without security, and that thereupon A. and C. made the note and guaranty, which the plaintiff accepted, and then delivered the goods

[1] *Smith* v. *Ives*, (15 Wend. 182,) and *Packer* v. *Wilson*, (Id. 343.)
[2] Comm. III. p. 123, note *a*.

which C. wanted. The offer was rejected, and upon a motion for a new trial, it was held, that C.'s guaranty was a collateral undertaking within the purview of the statute of frauds, for the note of A. was conclusive that the credit was given to him and not to the defendant; that as the note and guaranty imported upon the face of the paper, one entire and original transaction, A.'s note given for value received, and of course importing a consideration on its face was all the consideration requisite to be shown, since the value received was evidence of a consideration embracing both the promises. But if there was any doubt upon the face of the paper, whether the promise of A. and of the defendant was or was not concurrent, and one and the same communication, parol evidence was admissible to show the fact. This case was followed by *Bailey* v. *Freeman*, (11 Johns. 221,) and *Nelson* v. *Dubois*, (13 Ib. 175,) and was cited with approbation in *D'Wolf* v. *Rabaud*, (1 Peters, 476, 499, 501.)[1]

Under the Statute of Frauds, as enacted in England and originally in New York, the distinction established in these cases, between guaranties made at the same time with the debt, and the ground of credit to the maker of the note and guaranties of a pre-existing debt, where no additional credit was given, was a sound one, and the consequences flowing therefrom legitimate. But it may well be doubted whether *Jackson* v. *Vredenburgh*, since the enactment of the Revised Statutes, can be considered law in New York. They declare that "Every special promise to answer for the debt of another person shall be void, unless such agreement, expressing the consideration, be in writing, &c." There is no exception made here. Whether the agreement to answer for the debt of another be the ground of credit to the principal debtor, or whether it be made long after the debt guarantied, are questions, between which the statute does not discriminate.

These doubts, as to the authority of *Leonard* v. *Vredenburgh*, have often arisen in the courts of New York, though we have been unable to find any case which overrules that decision. Thus, in *Hall* v. *Farmer*, (5 Den. 489,) C. J. Beardsley says — "I must however say, that whatever may have been the true rule under the former statute of this State, which was in force when *Leonard* v. *Vredenburgh* and the other cases referred to in Story on Promis-

[1] Vid. also, by way of illustration, *Kirkby* v. *Coles*, (Cro. Eliz. 137,) and *Williams* v. *Leper*, (3 Burr. 1886.)

sory Notes were decided, I am wholly unable to see how any collateral undertaking for the debt, default or miscarriage of another, no matter when made, can be held valid under the present statute. Its language is explicit; it makes no exceptions in terms, nor do I find any in the spirit of the enactment. It extends to every collateral undertaking for another person, whether made at the time when the debt of the principal was created, or at any after-period." [1]

The law of the statute of frauds, in its application to guaranties of promissory notes, varies, as we thus see, in different countries. In Massachusetts, and in most of the United States, it is enough to put the promise to discharge the debt of another, upon his failure, in writing; while in England and New York, both the promise and its consideration must be expressed in a written instrument. There is, however, one exception to the rule, as laid down in the latter countries. Wherever the promise to pay the debt of another is collateral to the contract of the original debtor, but is the ground of credit given to him, there need be no other consideration for the guaranty — and consequently none need be expressed — than that moving between him and the creditor.[2] And universally, the statute of frauds has no application to those promises to answer for the debt of another, which arise out of some independent consideration moving between the guarantor and guarantee.

Recent American Decisions.

Supreme Court of the U. States, Dec. Term, 1852.

The General Mutual Insurance Company, Plaintiffs in Error,
vs.
Ebenezer B. Sherwood.

Insurance — Losses, of which the negligence of the master or mariners is the efficient cause, not within the policy.

Under a marine policy insuring against the usual perils, including barratry, the underwriters are not liable to repay to the insured damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.

In error to the Circuit Court of the United States for the Southern District of New York.

[1] Vid. 2 Coms. 233, 566.

[2] The doubts which have been expressed, as to the force of this exception under the Revised Statutes of New York, must not be overlooked.

Mr. Justice Curtis delivered the opinion of the court: — This is a writ of error to the Circuit Court of the United States for the Southern District of New York. The action was assumpsit on a time policy of insurance, subscribed by the plaintiffs in error, upon the brig Emily, during one year from the seventeenth day of October, 1843, for the sum of eight thousand dollars, the vessel being valued at the sum of sixteen thousand dollars. The policy, described in the declaration, assumed to insure against the usual sea perils, among which is barratry of the master and mariners. The declaration avers, that during the prosecution of a voyage within the policy, while on the high seas, and near the entrance of the harbor of the city of New York, by and through the want of a proper lookout by the mate of the said brig, and by and through the erroneous order of the chief mate, who was stationed on the top-gallant forecastle of the said brig, who saw the schooner hereinafter named, and cried out to the man at the wheel — "Helm hard down — luff;" — whereas he ought not to have given the said order, and by and through the negligence and fault of the said brig Emily, the said brig ran into a schooner called the Virginia, and so injured her that she sank, whereby the said brig Emily became liable to the owners of the said schooner and her cargo to make good their damages; which liability was a charge and incumbrance on the said brig. The declaration then proceeds to aver that the brig was libelled, by the owners of the schooner and her cargo, in the District Court of the United States; that a decree was there made, whereby it was adjudged, "That the collision in the pleadings mentioned, and the damages and loss incurred by the libellants in consequence thereof, occurred by the negligence or fault of the said brig; and that the libellants were entitled to recover their damages by them sustained thereby." That the same having been assessed, a decree therefor was made by the District Court, which, on appeal, was affirmed by the Circuit Court, which found "That the hands on board the Emily failed to keep a proper lookout, and that the said brig might have avoided the collision by the use of proper caution, skill, and vigilance." The declaration further avers, that the plaintiff has paid divers sums of money to satisfy this decree and the expenses of making the defence, amounting to the sum of eight thousand dollars.

This statement of the substance of the declaration pre-

sents the question which has been here argued, and sufficiently shows how it arose; for although there was a demurrer to the first two counts in the declaration, and a trial upon the general issue pleaded to the other counts, and a bill of exceptions taken to the ruling at the trial, yet the same question is presented by each mode of trial, and that question is, whether, under a policy insuring against the usual perils, including barratry, the underwriters are liable to repay to the insured, damages paid by him to the owners of another vessel and cargo suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.

The great and increasing internal navigation of the United States, carried on over long distances through the channels of rivers and other comparatively narrow waters, where the danger of collisions and the frequency of their occurrence are much greater than on maritime voyages, renders the respective rights of underwriters and insured, growing out of such occurrences, of more moment in this than in any other civilized country; and the court has considered the inquiry presented by this case with the care which its difficulty and its importance demand.

In examining, for the first time, any question under a policy of insurance, it is necessary to ascertain whether the contract has received a practical construction by merchants and underwriters, not through any partial or local usages, but by the general consent of the mercantile world. Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of its rule. This is true of most commercial contracts; but it is especially true of a policy of insurance, which has been often declared to be an "obscure, incoherent, and very strange instrument," and "generally more informal than any other brought into a court of justice;" (per Buller, J., 4 T. R. 2, 10; Mansfield, C. J., 4 Taunt. 380; Marshal, C. J., 6 Cr. 45; Lord Mansfield, 1 Bur. 347); but which, notwithstanding the number and variety of the interests which it embraces, and of the events by which it is affected, has been reduced to much certainty by the long practice of acute and well-informed men in commercial countries, by the decisions of courts in America and in England, and by able writers on the subject in this and other countries.

And it should not be forgotten, that not only in the introduction of this branch of law into England by Lord Mansfield, but in its progress since, both there and here, a constant reference has been had to the usage of merchants, and the science of insurance law has been made and kept a practical and convenient system by avoiding subtle and refined reasoning, however logical it may seem to be, and looking for safe practical rules.

Now although cases like the present must have very frequently occurred, we are not aware of any evidence that underwriters have paid such claims, or that down to the time when one somewhat resembling it was rejected by the Court of King's Bench in *De Vaux* v. *Salvador* (5 Ad. & El.), decided in 1836, such a claim was ever made. And we believe that if skilful merchants, or underwriters, or lawyers accustomed to the practice of the commercial law, had been asked whether the insurers on one vessel, were liable for damage done to another vessel, not insured by the policy, by a collision occasioned by the negligence of those on board the vessel insured, they would, down to a very recent period, have answered, unhesitatingly, in the negative.

As we shall presently show, such, for a long time, was the opinion of the writers on insurance on the continent of Europe, and in England and America. And this alone would be strong proof of the general understanding and practice of those connected with this subject.

But although this practical interpretation of the contract is entitled to much weight, we do not consider it perfectly decisive. It may be, that by applying to the case the settled principles of the law of insurance, the loss is within the policy; and that it has not heretofore been found to be so, because an exact attention has not been given to the precise question. Or it may be, that the weight of recent authority, and the propriety of rendering the commercial law as uniform as its necessities, should constrain us to adopt the rule contended for by the defendant in error. And therefore we proceed to examine the principles and authorities, bearing on this question.

Upon principle, the true inquiries are — What was the loss, and what was its cause?

The loss was the existence of a lien on the vessel insured, securing a valid claim for damages, and the consequent diminution of the value of that vessel. In other

words, by operation of law the owners of the Virginia obtained a lien on the vessel insured, as security for the payment of damages due to them for a marine tort, whereby their property was injured.

What was the cause of this loss? We think it is correctly stated by this court in the case of the Paragon, (14 Peters, 109.) In that case it was said: — "In the common case of an action for damages for a tort done by the defendant, no one is accustomed to call the verdict of the jury, and the judgment of the court thereon, the cause of the loss to the defendant. It is properly attributable to the original tort which gave the right to damages consequent thereon." The cases there spoken of were claims *in personam*. But the language was used to illustrate the inquiry, What should be deemed the cause of a loss by a claim *in rem?* and is strictly applicable to such a claim. Whether the owners of the Virginia would proceed *in rem* or *in personam*, was at their election. It affected only their remedy. Their right, and the grounds on which it rested, and the extent of the defendant's liability, and its causes, were the same in both modes of proceeding. And in both, the cause of the loss of the defendant would be the negligence of his servants, amounting to a tort. The loss consisting in a valid claim on the vessel insured, we must look for the cause of the loss in the cause of the claim, and this is expressly averred by the declaration to have been the negligence of the servants of the assured. From the nature of the case it was absolutely necessary to make such an averment. If the declaration had stated simply a collision, and that the plaintiff had paid the damages suffered by the Virginia and her cargo, it would clearly have been bad on demurrer; because although it would show a loss, it would state no cause of that loss. It is only by adding the fact that the damage done to the Virginia was caused by negligence—that is, by stating the cause of the damage—that the cause of payment appears, and, when it appears, it is seen to be the negligence of the servants of the assured.

We know of no principle of insurance law which prevents us from looking for this sole operative cause, or requires us to stop short of it in applying the maxim, *Causa proxima non remota spectatur.* The argument is, that collision being a peril of the sea, the negligence which caused that peril to occur is not to be inquired into; it lies behind the peril and is too remote. This is true when the

loss was inflicted by collision, or was by law a necessary consequence of it. The underwriter cannot set up the negligence of the servants of the assured as a defence. But in this case he does not seek to go behind the cause of loss, and defend himself by showing this cause was produced by negligence. The insured himself goes behind the collision, and shows as the sole reason why he has paid the money, that the negligence of his servants compelled him to pay it. It is true that an expense attached by the law maritime to the subject insured, solely as a consequence of a peril, may be considered as proximately caused by that peril. But where the expense is attached to the vessel insured not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the peril *per se* is not the efficient cause of the loss, and cannot in any just sense be considered its proximate cause. In such a case the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referable to the negligence of the master and mariners, such a loss is not covered by the policy. We are of opinion the policy cannot be so construed. When a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not inquired into; not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the insured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them.

These views are sustained by many authorities. Mr. Arnould, in his valuable treatise on insurance, (2 vol. p. 775,) lays down the correct rule: "Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged." To this rule must be referred that class of cases, in which the misconduct of the master or mariners has either aggravated the consequences of a peril insured against, or been of itself the efficient cause of the whole loss. Thus if damage be done by a peril insured against, and the master neglects to repair that damage, and in consequence of the want of such repairs the vessel is lost, the neglect to make repairs, and not the sea damage, has been treated as the proximate cause of the loss. In

the case of *Copeland* v. *The N. E. Marine Ins. Co.* (2 Met. 432.) Mr. Chief Justice Shaw reviews many of the cases, and states that "The actual cause of the loss is the want of repair for which the assured are responsible, and not the sea damage which caused the want of repair, for which it is admitted the underwriters are responsible." And the same principles were applied by Mr. Justice Story in the case of *Hazard* v. *N. E. Marine Ins. Co.* (1 Sum. R. 230.) where the loss was by worms, which got access to the vessel in consequence of her bottom being injured by stranding, which injury the master neglected to repair. So where a vessel has been lost or disabled, and the cargo saved, a loss caused by the neglect of the master to tranship, or repair his vessel and carry the cargo, cannot be recovered. *Schieflin* v. *N. E. Ins. Co.* (9 John. 21); *Bradhurst* v. *Col. Ins. Co.* (9 John, 17); *Am. Ins. Co.* v. *Centre* (4 Wend. 45); *S. C.* (7 Cow. 504); *McGaw* v. *Ocean. Ins. Co.* (23. Pick. 405.) So where condemnation of a neutral vessel was caused by resistance of search; *Robinson* v. *Jones*, (8 Mass. 536); or a loss arose from the master's negligently leaving the ship's register on shore; *Cleveland* v. *Union Ins. Co.* (8 Mass. 308.) So where a vessel was burnt by the public authorities of a place into which the master sailed with a false bill of health, having the plague on board; Emerigon (by Meredith), 348; in these and many other similar cases the courts, having found the efficient cause of the loss to be some neglect of duty by the master, have held the underwriter discharged. Yet it is obvious that in all such cases one of the perils insured against fell on the vessel. And they are to be reconciled with the other rule, that a loss caused by a peril of the sea is to be borne by the underwriter, though the master did not use due care to avoid the peril, by bearing in mind that in these cases it is negligence, and not simply a peril of the sea, which is the operative cause of the loss. It may sometimes be difficult to trace this distinction, and mistakes have doubtless been made in applying it, but it is one of no small importance in the law of insurance, and cannot be disregarded without producing confusion. The two rules are in themselves consistent. Indeed, they are both but applications to different cases of the maxim, *Causa proxima non remota spectatur.* In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we

inquire no further; we do not look for the cause of that peril. But if the peril of the sea which operated in a given case was not of itself sufficient to occasion and did not in and by itself occasion the loss claimed; if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured; then we must look beyond the peril to its cause to ascertain the efficient cause of the loss.

The case at bar presents an illustration of both rules. So far as the brig Emily was herself injured by the collision, the cause of the loss was the collision which was a peril insured against, and the assured showing that his vessel suffered damage from that cause, makes a case and is entitled to recover. But he claims to recover not only for the damages done to his vessel which was insured, but for damages done to the other vessel not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea, but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not and cannot rest upon the occurrence of a collision; this affords no ground for this claim; he must show a particular cause for that collision; and aver that by reason of the existence of that cause the loss was suffered by him, and so the underwriter became responsible for it.

This negligence is therefore the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the strictest sense it causes the loss to the plaintiff. The loss of the owners of the Virginia was occasioned by a peril of the sea, by which their vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss this negligence is the only efficient cause, and in the sense of the law it is the proximate cause.

The ablest writers of the continent of Europe on the subject of insurance law have distinctly declared, that in case of damage to another vessel solely through the fault of the master or mariners of the assured vessel, the damage must be repaired by him who occasioned it, and the insurer is not liable for it. Pothier, Traite d'Assurance, No. 49, 50;

Boucher, 1500, 1501, 1502; 4 Boulay Paty, Droit Maritime, (ed. of 1823,) 14-16, Santayra's Com. 7, 223; Emerigon (by Meredith), 337. If the law of England is to be considered settled by the case of *De Vaux* v. *Salvador* (4 Ad. and El. 420), it is clear such a loss could not be recovered there. Mr. Marshall is evidently of opinion, that unless the misconduct of the master and crew amounted to barratry, the loss could not be recovered, (Marsh. on Ins. 495.) And Mr. Phillips so states in terms, (1 Phil. on Ins. 636.)

It has been urged that in the case of the Paragon, *Peters* v. *Warren Ins. Co.* (14 Pet. 99), this court adopted a rule which if applied to the case at bar would entitle the insured to recover. But we do not so consider it. It was there determined that a collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the collision, and that was a peril insured against.

We are aware that in the case of *Hall* v. *Washington Ins. Co.* (2 Story), Mr. Justice Story took a different view of this question, and we are informed that the Supreme Court of Massachusetts has recently decided a case in conformity with his opinion, which is not yet in print, and which we have not been able to see. But with great respect for that very eminent judge, and for that learned and able court, we think the rule we adopt is more in conformity with sound principle, as well as with the practical interpretation of the contract by underwriters and merchants; and that it is the safer and more expedient rule.

We cannot doubt that the knowledge by owners, masters and seamen, that underwriters are responsible for all the damage done by collision with other vessels through their negligence, would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this cause.

The judgment of the Circuit Court must be reversed, and the cause remanded, with directions to render a judgment for the defendants on the demurrer to the first two counts, and award a *venire de novo* to try the general issue pleaded to the other counts.

Supreme Court of Pennsylvania, July, 1852.

JOHN KOONS *v.* STEPHEN STEELE ET AL.

Where a party claims title to land by means of an adverse possession of it for twenty-one years, if the tenants or other agents employed by him to keep up said possession failed to continue in possession, or, continuing to occupy, failed to preserve the hostile character of the possession for the necessary period required by the Statute of Limitations, a link in the possession is broken and the title by possession fails.

If the person in possession under the original trespasser, contract to purchase of the rightful owner, and a survey is made of the property in pursuance of such contract, this is as perfect an interruption of the hostile possession as if the intruder had been turned out of possession by due course of law.

Where such intruder receives a deed from and executes a mortgage to the rightful owner, the wrongful possession uniting with the legal title becomes thereby drowned in the greater and better estate of the rightful owner.

In such case the effect is the same, although the purchase of the legal title was made by a tenant in possession without the knowledge or consent of his landlord, if the transaction be free from fraud on the part of the legal owner.

A recovery in ejectment by a landlord against his tenant, and an omission by the landlord to take out a writ of possession, or otherwise to assert his rights for twenty-one years after such recovery, dissolve the relation of landlord and tenant, and the possession of the tenant becomes a disseizin by the landlord's election.

An estate to husband and wife differs from a joint tenancy in this, that they cannot take by moieties, but must take by entireties, or not at all, and the wife cannot take such estate if the husband be estopped.

HARRISON entered upon a tract of woodland belonging to Cummings, and afterwards put Steele, his son-in-law, in possession. The latter lived on the premises for many years, cleared land, made improvements, and exercised the usual acts of ownership. In 1817 Steele made a contract with Cummings for the purchase of the land, and a survey was made by Cummings in 1818, in pursuance of the contract. At this time the adverse possession of Harrison first and Steele afterwards, added together, had not continued for the period of twenty-one years. Cummings, in pursuance of the contract, executed and delivered a deed to Steele, and the latter executed a mortgage for the purchase-money, and both instruments were recorded the same day. The purchase-money not having been paid, the mortgage was foreclosed; Cummings became the purchaser, and conveyed to Koons, the plaintiff below, who brought his ejectment in due time after the foreclosure. Before the foreclosure of the mortgage, Harrison brought an ejectment against his son-in-law, Steele. The writ was issued on

the 10th March, 1825, and a verdict and judgment was obtained in favor of Harrison on the 18th Nov. 1825, for the premises included in the conveyance from Cummings. Harrison never took out a writ of possession, but died in 1834, having devised the land to "Jacob Steele and Lydia his wife, and her heirs." Steele died in 1840, and the present ejectment is against his widow and children, who relied upon an adverse possession of Harrison for twenty-one years. The defendants obtained a verdict and judgment in the court below, and plaintiff there sued out this writ of error.

On the 27th July, 1852, the opinion of the court was delivered by

Hon. Ellis Lewis, Justice. — At the time of Jacob Steele's purchase of the land, in 1817, from George M. Cummings, the latter held an indefeasible title, by warrant, survey, and patent; and there had been no adverse possession by Steele, or others, for the period required by law to give title to a trespasser. The contract of purchase and sale in 1817, and the entry and surveys in 1818 for the purpose of locating and ascertaining the boundaries of the tract to be conveyed, were in equity a conversion of the land into money, and from thenceforth Cummings held the title for Steele as a trustee, and the latter held the possession in subordination to the title of Cummings. The subsequent conveyance of the land, and the execution of the mortgage to secure the purchase-money in pursuance of the agreement of 1817, amounted to a perfect union in Cummings of the possession, the right of possession, and the title. The hostile possession of Steele became merged in the lawful possession of Cummings under the legal title; the possession of Steele, the mortgagor, was the possession of Cummings the mortgagee. So far as regards the rights of Cummings, this was as complete an interruption of the adverse possession claimed by Harrison by virtue of Steele's occupancy, as if the legal owner had actually entered and turned Steele out of possession by violence or by action of ejectment. The acts last mentioned would produce this result irrespective of Harrison's consent, and so would the former. Nothing short of fraud in Cummings would take from these proceedings this their necessary and legal effect.

But no evidence of fraud on the part of Cummings exists in the case. It does not appear that he had any knowledge whatever of the relations existing between Steele and Har-

rison, and the long possession of Steele without the payment of rent, and the improvements made and acts of ownership exercised by him, were well calculated to create the impression that he held the possession for himself, and not under Harrison or any one else.

There is no evidence of collusion between Steele and Cummings to conceal the transaction from Harrison, for the purpose of inducing him to slumber upon his supposed rights. On the contrary the evidence is, he was consulted about the purchase by Steele, and that the deed and the mortgage were publicly recorded on the day on which they were executed.

The pinch of the case is, that Harrison's title depends upon an adverse possession, continued twenty-one years without interruption, and that the agents employed by him to keep up this hostile possession failed to do so. Thus a link in the possession is broken, and his pretence of title falls to the ground.

He may hold his agents responsible for their unfaithfulness, but he cannot visit their sins upon others. Where one or two persons must suffer by the acts of a third, the loss falls upon him whose fault or misfortune it was to employ the latter as his agent in the business.

As Harrison claims through the acts of his agents, he must necessarily take the consequences of their delinquencies. If the case stood between Harrison and Steele or those claiming under him, the latter could not set up an adverse title until the possession was restored. This is the principle decided in *Rankin* v. *Tenbrook*, (5 W. 386.) But here where Koons, claiming under the rightful owner, is concerned, a different principle governs the case. Where there is a union of the fee, and the term in one person at the same time, the greater estate merges in and drowns the less, and the term becomes extinct. The estate on which the merger takes place is not enlarged by the accession, and the greater, or only subsisting estate, continues after the merger precisely of the same quantity and extent as it was before the accession of the estate which is merged, and the lesser estate is extinguished. (4 Kent, 99.) The same principle applies, where a wrongful possession and the title of the rightful owner unite in the same person.

Even where two persons are at the same time in possession, the seizin is adjudged to be in the rightful owner. (Litt. sec. 701; 4 Kent, 482.) The seizin of Steele, for

the instant of time required for the execution of the deed and mortgage, had no injurious effect upon the title of Cummings. But it destroyed the possession of Steele. The rivers of the continent, as they flow along their channels, drown the lesser streams which lie in their course to the ocean. So the title of Cummings, as it descended from the Commonwealth, merged in its sweep the wrongful possession of Steele, and carried it into the hands of the rightful owner of the land. This title which is now vested in Koons is not in any manner affected by the abortive attempt of Harrison to hold the land adversely for twenty-one years.

Harrison himself could not, as against Cummings, claim the possession of Steele as adverse after it had ceased to be so. Those who claim under Harrison are in no better predicament. Least of all can Steele, the mortgagor, or those who came into possession under him, be permitted to set up the pretended title of Harrison against Cummings, the mortgagee. The widow and children of Steele came into possession under him, and, upon his death in 1840, the law cast the inheritance upon his children, charged with every encumbrance, and affected by every estoppel which bound Steele himself. Their possession, being derived from him, can only be maintained by the means which their ancestor might lawfully use.

The devise in the will of Harrison (who died in 1834) to "Jacob Steele, and Lydia Steele his wife and her heirs," was an attempt to create an estate in Steele which he is estopped, by his mortgage to Cummings, from receiving in hostility to the interests of the latter.

An estate to husband and wife differs from a joint-tenancy in this, that they cannot take by moieties, but must take by entireties or not at all. It is essential to the validity of the title that they must be seized of the entireties; and as the wife and the husband are one, she cannot take such estate at all if the husband be estopped. In the case before us, the wife having received the possession, by and through her husband, has no right to maintain it by means of a title which the latter was precluded by law from asserting. The children have of course no claim, as her heirs, while she is in full life, and as the heirs of their father, we have already seen that they are affected by all the equities which bound him.

The recovery in ejectment by Harrison against Steele is relied upon as defeating the title of Cummings, and was doubtless designed for that purpose. The writ was issued on the 10th March, 1825, and the verdict and judgment were rendered on the 18th Nov. 1825, for all the land described in the deed from Cummings to Jacob Steele. No *habere facias* was ever issued on this judgment, nor was the possession of Steele in any manner disturbed by it. So that Steele continued in possession, under the Cummings title, as before; with this difference, that whatever doubts may exist as to the right of Harrison to treat the purchase by Steele of the Cummings title as a disseisin or not, at his election, there can be no doubt, that the ejectment was an election to treat it as a disseisin, and to regard himself as out of possession, and Steele as holding adversely under the deed fom Cummings. The recovery in ejectment dissolved the relation of landlord and tenant, (1 Dana, 201,) and Steele's continuance in possession adversely, for the period of twenty-one years after the recovery, would be conclusive upon the claim of Harrison, even as between himself and Steele. These views of the case conduct us to the conclusion, that the court erred in admitting the evidence of adverse possession as stated in the first bill of exceptions.

We perceive no other error on the record. In making the last remarks, we desire to be understood as holding that the charge of the court below is not before us, because it has never been filed by the President Judge. He states that fact in a paper filed, and gives as a reason for it that "No exception was taken to the charge, so far as the court were informed." It is presumed that the exceptions, although entered of record, were, through some mistake, not brought to the notice of the President Judge. His written statement, that he charged "in favor of the plaintiff's right to recover, upon the grounds covered by the points," cannot be received as a compliance with the act requiring him to file his charge. The plaintiff in error has a right to the charge itself, in order that he may demand the judgment of this court upon the question whether it was in his favor or not. But we cannot reverse for an omission to file it. The regular course is, for the plaintiff in error to take measures to procure a compliance with the law in that respect, before he assigns errors.

The third point affirms, by implication, that the knowledge of Harrison that Steele purchased of Cummings, was

a material element in its legal effect upon the possession. The first would seem to regard his "consent" as necessary to the interruption of the adverse occupancy. But the third very properly treats both these circumstances as immaterial. If the court affirmed all these points without explanation or qualification, the charge was repugnant and erroneous, and tended to mislead the jury. It is but fair to presume, in the absence of the charge, that the court gave all the explanations calculated to lead to a correct decision. It was its duty to give clear instructions on all the principles of law which arose in the case. In general, this can be better done in a connected charge than in isolated responses to the points. Where no material facts are in dispute, and the case in point of law is clearly with one party or the other, the highest obligation of judicial duty requires a peremptory declaration to that effect. If any branch of the law has peculiar claims upon the firmness of the bench, it is that which relates to land titles. The contest is frequently between distant owners and individuals claiming by possession or settlement. In such cases, the hardships and poverty of the latter always secure the sympathies of their benevolent neighbors, when called into the jury-box. Under such circumstances, the court should hold the scales of justice with a steady hand, and the law should be explicitly declared and firmly maintained by the judges selected for that purpose. There is among our intelligent and upright people an abiding devotion to its supremacy, which will generally, under such instructions, secure a correct decision.

If the rightful owner may be induced to delay his ejectment against a trespasser upon his land by the solemn obligations of the latter to purchase and pay for it, and the possession thus continued may be afterwards set up against him as a valid title without payment, the most glaring frauds might be practised. The statute of limitations was designed to operate upon those who delay their actions unreasonably after their rights accrue. But the wrongdoer in possession may induce the owner to enter into a contract, which puts it out of his power to bring his action until the period agreed upon for payment arrives; and this contract may be entered into for the very purpose of settling the controversy in peace. To apply the statutes to such a case would be a misconstruction of its provisions, which would enable the trespasser not only to profit by his own

wrong, but to gain an unjust advantage by the violation of his own contract.

As the evidence stands upon the paper book, we do not perceive any defence whatever against the title of the plaintiff below. If, upon another trial, the cause should wear the same aspect, it is the judgment of this court that the law in favor of the plaintiff's right to recover ought to be distinctly declared and effectively enforced.

Judgment reversed, and *venire de novo* awarded.

Woodward, Justice, having been counsel in the cause, took no part in hearing and deciding in this court.

H. Wright, Esq., for plaintiff in error.

Hon. Hendrick B. Wright, for defendant in error.

Miscellaneous Intelligence.

ACHILLI *v.* NEWMAN. — This case, which has excited much interest from the character and position of the parties, and from the virulence with which it has been conducted, not only by the counsel, but by the court, has at length come to an end so far as its merits are concerned; the only question remaining being one of costs. We gave an account of the trial of the cause in the August number of the Reporter, (ante, p. 229.) A violent effort was made, and pressed with great pertinacity, to obtain a new trial. A large array of eminent counsel appeared to support the motion in behalf of the defendant, which was firmly resisted by the counsel for the prosecution. The garrulity of the Chief Justice was as peculiar at the hearing upon this rule, as upon the trial; the difference was, that its drift was in the opposite direction. He did not consider himself at this hearing called upon to "thank God we have not in this country a tribunal of inquisition."

But the rule was refused, and (January 31) the defendant was called up for sentence. For the first time the defendant appeared to realize his position, and affidavits were offered and read in mitigation of punishment. The principal affidavit was that of Dr. Newman himself. Its substance was the same as that of the pleas; its object was to show that he had reason to suppose not only that the charges were true, but that he could prove them to be so. A question arose as to how far the affidavit could make general statements which imputed impropriety of conduct to Dr. Achilli. We give the passage as reported in the English papers. The affidavit was going on to say, "That in reference to Dr. Achilli's removal from the Protestant college at Malta, he, Dr. Newman, believed that he had been removed for fornication, ——

"*Sir F. Thesiger* objected to the defendant's going on to make statements as he was now doing.

Lord Campbell said, the evidence was receivable in mitigation of punishment.

Sir F. Thesiger said, Dr. Achilli had no opportunity of answering what the defendant was now alleging.

Lord Campbell said, the defendant had a right to show that he had ground for believing that Dr. Achilli was removed upon the ground stated, though he was at the trial unable to prove it. It was to mitigate the sentence which the court had to pronounce.

The Attorney-General (of counsel for defendant) said that Dr. Newman wished to put the court in possession of the evidence laid before him when he put the plea of justification on the record.

Lord Campbell. — This is not an affidavit of the truth of the charge, but to show that there was reasonable ground for excusing the defendant in bringing it.

Mr. Justice Coleridge thought that what followed in the affidavit occurred after the plea was pleaded, and could not be admissible to show the truth of the charge. His Lordship read a passage from the affidavit, which stated that, in January, 1852, Dr. Newman received an affidavit from Rome, from a person who stated that he had evidence to prove the charges.

Sir F. Thesiger. — The plea was pleaded in the December previous.

The Attorney-General. — But it was pleaded without the names of the parties, and then it was recast, and the names were added.

Mr. Justice Earle said, the evidence was admissible to show that the defendant had good ground to plead the plea of justification. In a civil action, the defendant's pleading a plea of justification was some evidence of malice. Now, the court was to look at the plea and see whether it aggravated or mitigated the offence. If it was pleaded without any evidence to support it, that would be evidence of malice, and, therefore, the evidence is admissible to show that he had ground for pleading the plea.

Mr. Justice Wightman said the libel contained no names, and the plea, as originally pleaded, contained no names; but that was demurred to upon the very ground that the charges were not specific. Upon that the names were added. One question for the court now was, whether the offence was aggravated or mitigated by the plea. The affidavit asserts a reason why the names of the parties were put in.

Mr. Justice Coleridge said he entirely agreed with his brethren as to their principle; he only differed from them as to the fact.

Lord Campbell said, the statute said it shall be competent for the court, in pronouncing sentence, to see whether the offence is aggravated or mitigated by the plea and by the evidence. The evidence was therefore admissible, to show how it was that a charge wholly unsupported by evidence was put on the record."

After the affidavits were read, the court was entreated in mitigation. First came the Attorney-General in a speech of considerable length, which, at its conclusion, " was followed by some applause, which was immediately checked by the officers of the court." " Serjeant Wilkins then followed on the same side," " in an address pronounced with great force and energy, which elicited loud applause at its close, which was also checked immediately by the officers of the court." " Mr. Bramwell, Q. C., Mr. Addison and Mr. Bradley, severally addressed the court upon the same side at some length."

Sir F. Thesiger and F. Kelly spoke " at some length " in aggravation, when

" The arguments on both sides having been concluded,

Dr. Newman rose, and came forward on the floor of the court, and asked to be allowed to make some observations.

Lord Campbell said he had already been heard by several very able counsel, but still he should not refuse to hear any thing he had to say. His Lordship asked whether he had communicated with his counsel.

The Attorney General said he was not aware what Dr. Newman was about to state. All he knew was, that he wished to add some observations.

Lord Campbell said he would recommend the defendant to let the matter rest as it was.

Dr. Newman then desisted and sat down.

Their Lordships then conferred together for a few minutes. After which,

Dr. Newman rose and took his station on the floor of the court to receive judgment.

Lord Campbell asked whether it would be inconvenient to Dr. Newman to stand while the court expressed their opinion?

Dr. Newman said it would not be at all so.

Mr. Justice Coleridge, as the senior puisine judge, then pronounced sentence as follows: — John Henry Newman, I am now to pronounce the sentence of the court for the misdemeanor of which you have been found guilty, viz., of having published a libel reflecting seriously upon the character of the prosecutor, Dr. Giacinto Achilli. So much has already been said in this case, that it will be unnecessary for me to review at any length the proceedings which have taken place. The information having been filed, you pleaded two pleas — first, the plea of 'Not guilty,' denying the publication of a libel; and, secondly, you pleaded a plea under a recent statute, in which you undertook to establish two things, viz., that the charges made in the libel were true, and that the publication was for the benefit of the public. At the trial of the issues it was admitted that, if the libel was true, its publication was for the public benefit; but, on the other hand, it was equally clear that, if it was not true, its publication could not in any way be for the benefit of the public. After a very long trial, the jury expressed their opinion that the plea of justification was not made out. There were many allegations in the plea, upon which there was evidence both on the one side and on the other, both to prove and disprove the same, but the jury expressed their opinion that there was but one upon which they were agreed. Within the usual time for moving for a new trial, your counsel made no application to this court; but at a later period, when you were brought up to receive judgment, an application was made that they should be heard to impeach the propriety of the verdict which the jury had passed against you. The court yielded to a single precedent, which was cited in support of the application, (at the same time laying down a different rule for future practice,) and the rule came on to be argued. That rule was then discharged, after the court had listened to a long and able argument; and the ground upon which it was discharged was one which might have been urged in the first instance, and which, if it had been urged, might have prevented the court from granting the rule at all. But the case was a new one, and arose upon the construction of a recent statute; and the court thought it was better that the subject should be discussed. For my part, I am of opinion that no time has been lost in the discussion of this question, but that the discussion which it has undergone has proved to the advantage of the interests of justice, and will enable the court at the present moment better to discharge its duty. In discharging that rule, the court did not find it necessary to express any opinion on the propriety of the conclusion to which the jury had come. They discharged it on the ground that the jury would still be bound to find the same verdict upon the issue submitted to them, and that a second trial must lead to the same result. But in discharging that rule and refusing a new trial, it was satisfactory to the court to find, that when you should be brought up for judgment it would be incumbent on them, and they were bound to consider

the plea of justification, and the evidence on both sides adduced in proof and disproof of the allegations which it contained, with a view to see, not whether the verdict was right or wrong, (whether the prosecutor was guilty or not guilty of the charges alleged against him,) but whether your guilt, established by the verdict, was aggravated or mitigated by the plea of justification which you had pleaded, and by the evidence adduced on both sides. The court, therefore, in the discharge of their duty, have entered into a consideration of all the circumstances of the case. In addition to that, they have heard to-day, in the same manner as they would have heard in any ordinary case, and before the statute in question passed, affidavits read on the part of the defendant in mitigation of punishment; and, looking at all these circumstances, I believe I speak the opinion of every member of the court when I say that you honestly believed the truth of the allegations which you made in the plea which you put on the record. They (the court) see no reason to deny implicit credence to the statement which you have this day made on oath, for they believe you are a man incapable of stating what is not the truth. Neither do they think that this publication arose from any reckless belief which you had taken up, but that you, receiving the story from some one whose character you respected, and having made inquiries upon the subject, and understanding that those charges had been made many months before, and had received no contradiction, you thought you had good grounds for believing that they were true. The court further believe that you composed and published this libel, not from any personal malice which you entertained towards Dr. Achilli, but because you thought that, as he had assailed the religion which you so much value, and came as a personal authority and eye-witness of the transactions of which he spoke, it was extremely important, especially in the town of Birmingham, to which he came, that you should meet the charges which he made by exposing his character, and so deprive him of the authority which he would otherwise acquire. This brings me to the question of the actual truth or falsehood of those accusations which you put upon the plea of justification. In addressing myself to them, I cannot but advert to the strong and unqualified language which your counsel have used. Upon this point I must observe, that there are many circumstances in this case which ought to induce one to pause before adopting such extraordinary and strong language as that which has been used by them on your part. In the first place, there is an extreme improbability in the story which you put forward against Dr. Achilli. One can hardly believe that a man could have been so wicked for so many years, and, according to your statement, so notoriously wicked, and yet that he could have been so caressed and honored, and trusted with so many high appointments in the Roman Catholic Church down to the time when he lapsed and separated from that church. There was another circumstance which could not fail to arrest the attention of any one who considered the matter, and that was, the motives which had been put forward by the witnesses who came from Italy. One of them said she came for the honor of the Holy Mother Church and the Virgin Mary. These were venerable names, but none more likely in the case of uneducated witnesses, when speaking of remote transactions, to lead them into error and exaggeration. Another circumstance which could not but press upon the mind, was the extreme difficulty and almost impossibility in the way of your opponent's effectually contradicting the story. Much was said of the difficulty under which you labored of bringing witnesses to this country to support your allegations; but in the case of Dr. Achilli, who had left the Roman Catholic Church under the sentence of the Inquisition, how much more difficult would it be for him to induce witnesses to come here and speak as to his character,

and to contradict the witnesses which you brought forward? All these are circumstances which the jury were right in taking into their consideration. These observations do not apply to the whole of the evidence, but they do apply to a portion of it. Taking all these circumstances into our consideration, the court is not so entirely satisfied with the finding of the jury on these facts that, if the question of the granting a new trial had turned simply and solely on the finding of the jury as to the facts, the court would have had no difficulty in saying that there was so much question as to the propriety of the verdict, that, in their opinion, there ought to be a new trial, in order that the case might be again submitted to a jury. But these circumstances ought to have been more felt by those who had argued this case. [Here, as well as in several other parts of his Lordship's sentence, there was so much noise and confusion in the court and passages, arising from the crowds collected, that it was difficult to catch what fell from his Lordship's lips. At other times his Lordship spoke in such a low tone as to be quite inaudible.] We understood his Lordship to say, that the trial had been so anxiously attended by such numbers, that it was impossible not to see that it was considered by many that the question at issue was one which deeply interested the church of England and the church of Rome. That, however, was an erroneous supposition. It seemed to him that the church of England, at least, had no interest in this issue. The church of England, when slandered, might have said, that however much she regretted that Dr. Newman was no longer one of her members, she could appeal to writings which had proceeded from his own pen, when one of her ministers, in favor of the soundness of her doctrines, &c. [Here his Lordship was understood to quote a passage from one of Dr. Newman's writings, but such was the noise in court, and the low tone in which his Lordship spoke, that not one word reached us.] His Lordship then proceeded thus: — These observations I make because they are so obvious, and it is but fair and candid that justice should be done to the jury. The duty of the court is to find whether your guilt is mitigated or aggravated by your plea and the evidence, and it is bound to consider the whole case against you. The plea made it necessary to set out a great many charges. Upon some portions there was evidence, and upon others there was not. That evidence may have raised a probability, though not of such a character as to induce a jury to act upon it. But he who undertakes to bring forward these charges, ought not to make them unless he has the best reason for believing that he will be able to prove them, for if he fails, he does an injury to his neighbor. In passing from the matter of the libel, I regret to say that there is something to be said as to the manner of it, which I have noticed with infinite pain and regret. It appeared to me, as a mere matter of taste, to be totally different from the usual style of your productions, and, what was much worse, there was a certain array in setting out those imputations which you closed in a manner which has exposed you to the observations made by the learned counsel, (Sir F. Thesiger,) which you have heard to-day I have no doubt with surprise. I allude to the manner in which you have given expression to the last charge. That, I think, lays you open to the imputation of recklessness. The spirit, too, in which you allude to the church which you have quitted is much to be condemned. His Lordship here read the first sentence of the libel, in which the defendant spoke of Protestantism, 'wiping its mouth, and turning up the whites of its eyes, and trudging to the town-hall, to hear something against the Catholic Church;' and observed, that that was not the manner in which the defendant ought to have spoken of the church of which he had been so long a minister. The whole libel was conceived in the same spirit, which was one of exultation over his opponent, whom he ought to have

regarded, if he believed him guilty, as a most unhappy man. Surely, (the learned judge continued) if you felt yourself called upon to act as a judge and executioner of a man so full of sin as you there describe, it ought to have been with sorrow and sadness; but human nature shudders to hear the executioner, as he brandishes his sword, exulting as you did, and repeating his crimes, as if they had been matter for exultation, instead of sorrow. I have now stated the different points of your case. I hope that even in this crowded court there is not a single individual who looks with any thing like a feeling of triumph upon the spectacle which is now before it. I am sure, speaking for the court, that the sentence which it is about to pronounce by my mouth is not intended to be the cause of exultation to any one. The punishment to be meted out to you is proportioned to the act done, and the motives under which it was done. As a member of the church of England, in which I have lived and in which I hope to die, I feel nothing so painful to my mind as seeing you in that position. I can hardly expect that you will take in good part the observations which I may make; but still I would say that the just controversy between the church of England and the church of Rome will go on, and, if you are to take any part in that controversy in future, it must be in a different temper and spirit. I will give you this warning — to meet your opponents with a calm refutation of arguments and increased holiness of life, and seek to sustain your church with a spirit of truth and holiness of life which shall be worthy of your community. [His Lordship was here again scarcely audible, so that we fear his words are but imperfectly reported.] The sentence of the court is, that you pay to Her Majesty a fine of £100; and, further, that you be imprisoned among the misdemeanants of the first class in the Queen's Prison till the fine be paid. [At the conclusion of the sentence, when the words 'till the fine be paid' were pronounced, there was a very general titter in the court, and loud laughter from the back benches.]

Dr. Newman remained in court for a few moments, while a check was drawn by his attorney for the amount of the fine, and he then left with his friends.

As soon as the crowd somewhat diminished, and it was possible for counsel to be heard,

The Attorney-General said he was now to argue the question as to whether the prosecutor was entitled to the costs of the rule *nisi* for a new trial.

Lord Campbell said, that in looking at the act of Parliament, he found that the prosecutor was entitled to the costs to which he might be put by an unsuccessful plea of justification; so that the question could be raised, if necessary, on the taxation of costs. If the Master should decide against the defendant, he could then apply to the court to review the taxation.

Sir F. Thesiger said he had deemed it right to apply to the court. The question could, however, be discussed hereafter, if necessary."

Fees in United States Court. — We give below in full the Fee Bill enacted by the last Congress. It will be chap. 80, p. 161, of the Laws of 32d Congress, 2d Session.

An Act to regulate the Fees and Costs to be allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for other purposes.

Be it enacted, &c., That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, the following and no other

compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to, and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

Fees of Attorneys, Solicitors, and Proctors.

In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided*, That in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of his attorney shall be but ten dollars.

In cases at law, where judgment is rendered without a jury, ten dollars and five dollars where a cause is discontinued.

For *scire facias* and other proceedings on recognizance, five dollars.

For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.

A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal.

For examination by a district attorney before a judge or commissioner of a person or persons charged with crime, five dollars per day for the time necessarily employed.

For each day of his necessary attendance in a court of the United States, on the business of the United States, when the same shall be held at the place of his abode, five dollars, and the like sum for his attendance for each day of the term when the said court shall be held elsewhere.

For travelling from the place of his abode to the place of holding any court of the United States in his district, and to the place of any examination before a judge or commissioner of a person or persons charged with crime, ten cents per mile for going and ten cents for returning.

When an indictment for crime shall be tried before a jury, and a conviction is had, in addition to the attorney's fees allowed by this act, the district attorney may be allowed a counsel fee in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.

In every case where a district attorney has, during the last six years, prosecuted or defended a suit in which the United States was concerned, in a district where the law allows no taxable attorney's fees, and for which he has received no compensation, except his per diem and annual salary, he shall be paid for his services according to the provisions of this act.

For the services of counsel, rendered at the request of the head of a department, such sum as may be stipulated or agreed on.

Whenever there are or shall be several charges against any person or persons for the same act or transactions, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated.

Whenever two or more things belonging to the same person or persons are or shall be seized for an allegal violation of the revenue laws, the whole shall be included in one suit; and if not so included, and separate actions are prosecuted, the court may consolidate them.

Whenever two or more indictments, suits, or proceedings are or shall be prosecuted, which should be joined, the district attorney prosecuting them shall be paid but one bill of costs for all of them; and if any attorney,

proctor, or other person admitted to manage or conduct causes in any court of the United States, or of the territories thereof, shall appear to have multiplied the proceedings in any cause before such court so as to increase costs unreasonably and vexatiously, such person may be required, by order of the court, to satisfy any excess of costs so increased.

Whenever two or more charges are or shall be made, or two or more indictments shall be found against a person, only one writ or warrant shall be necessary to arrest and commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offences, or to refer to them only in very general terms. Only one writ or warrant shall be necessary to remove a prisoner from one district to another, a copy of which may be delivered to the sheriff or jailor from whose custody the prisoner may be taken, and another copy thereof to the sheriff or jailer to whose custody he may be committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he may be removed. Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to the sheriff or jailer as his authority to hold the prisoner, and the original writ, warrant, or mittimus shall be returned to the proper court or officer with the officer's return thereon.

Clerks' Fees.

For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except a writ of venire, summons or subpœna for a witness, one dollar.

For filing and entering every declaration, plea, or other paper, ten cents.

For administering every oath or affirmation to a witness, or other person, except a juror, ten cents.

For entering any return, rule, order, continuance, judgment, decree, or recognizance, drawing any bond, or making any record, certificate, return, or report, for each folio fifteen cents; and for a copy of any such entry or record, or of any paper on file, not exceeding one folio, ten cents; and for each addititional folio, ten cents.

For making dockets and indexes, and for all other services, on the trial or argument of a cause where issue is joined and testimony given, including venire and taxing costs, three dollars.

For making dockets and indexes, and for all other services, in a cause where issue is joined and no testimony given, including taxing costs, two dollars.

For making dockets and indexes, and for taxing costs and other services, in a cause which is dismissed, discontinued, or a judgment or decree is made or rendered therein without issue, one dollar.

In equity and admiralty causes, only the process, pleadings, and decree, and such orders and memoranda as may be necessary to show the jurisdiction of the court, and regularity of the proceedings, shall be entered upon the final record; and in case of an appeal, copies of the proofs, and of such entries and papers on file, as may be necessary on hearing of the appeal, may be certified up to the appellate court.

For affixing a seal of the court to any instrument when required, twenty cents; for issuing a writ of subpœna, twenty-five cents; for every search for each mortgage, judgment, or other lien, fifteen cents; for travelling from the office of the clerk, where he is required by law to reside, to the place of holding any court required to be held by law, five cents per mile for going, and five for returning, and five dollars per day for his attendance on any such court or courts while actually in session.

For receiving, keeping, and paying out money, in pursuance of the

requirements of any statute or order of court, one per cent. on the amount so received, kept, and paid.

In cases removed by writ of error or appeal, the clerk's fees for making dockets and taxing costs shall be but one dollar.

Marshals' Fees.

For service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpœna for a witness, two dollars for each person on whom such service may be made: *Provided*, That on petition setting forth the facts on oath, the court may allow such fair compensation for the keeping of personal property attached and held on mesne process, as shall, on examination, be found to be reasonable.

For serving a writ of subpœna on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for witness.

For travel in going only to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil and criminal cases, six cents per mile, to be computed from the place of service to the court or place where the writ or process is returned; and if more than one person is served therewith, the travel shall be computed from the court to the place of service which shall be the most remote, adding thereto the extra travel which shall be necessary to serve it on the others: *Provided*, That when more than two writs of any kind, in behalf of the same party or parties, to be served on the same person or persons, or part of the same person, are or might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause, in each subpœna, as convenience in serving the same will permit. And in all cases where mileage is allowed to the marshal by this act, it shall be at his option to receive the same, or his actual travelling expenses, to be proved on his oath to the satisfaction of the court.

For each bail bond, fifty cents.

For summoning appraisers, each fifty cents.

For every commitment or discharge of a prisoner, fifty cents.

For every proclamation in admiralty, thirty cents.

For sales of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying the money, for any sum under five hundred dollars, two and one-half per centum; for any larger sum one and one-quarter per centum upon the excess.

For serving an attachment *in rem* or a libel in admiralty, two dollars, and the necessary expenses of keeping boats, vessels, or other property attached or libelled in admiralty, not exceeding two dollars and fifty cents per day; and in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess over five hundred dollars: *Provided*, That in case the value of the property shall be less than the claim, then and in such case such commission shall be allowed only on the appraised value thereof.

For serving a writ of possession, partition, execution, or any final process, the same mileage as is herein allowed for the service of any other writ, and for making the service, seizing or levying on property, advertising, and disposing of the same by sale, set-off, or otherwise, according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the several States respectively in which the service may be rendered.

For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each; and in those States where jurors, by the laws of the State, are drawn by constables, or other officers of corporate towns or places, by lot, the marshal shall receive for the use of the officers employed in drawing and summoning the jurors and returning each venire, two dollars; and for his own trouble in distributing the venires, two dollars for each jury: *Provided*, That in no case shall the fees for distributing and serving venires, and drawing and summoning jurors by township officers, including mileage chargeable by the marshal for such service, at any court, exceed fifty dollars.

For travelling from his residence to the place of holding court, to attend a term thereof, ten cents per mile for going only, and five dollars per day for attending the circuit and district courts when they are both in session, or for attending either of said courts when but one is in session, and for bringing in and committing prisoners and witnesses during the term.

For executing a deed prepared by a party or his attorney, one dollar.

For drawing and executing a deed, five dollars.

For transporting criminals, ten cents per mile for himself, each necessary guard, and each prisoner.

For copies of writs or papers furnished at the request of any party, ten cents per folio.

For holding a court of inquiry or other proceeding before a jury, including the summoning of a jury, five dollars. The marshal of the District of South Carolina shall hereafter be entitled to receive a salary of two hundred dollars per annum.

The respective courts of the United States shall appoint criers for their courts, to be allowed the sum of two dollars per day; and the marshals are hereby authorized to appoint such a number of persons, not exceeding five, as the judges of their respective courts shall determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands, the compensation to be given only for actual attendance; and when both courts are in session at the same time, to be paid but for attendance on one court.

For expenses while employed in endeavoring to arrest under process any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars per day, in addition to his compensation for service and travel.

For disbursing money to jurors and witnesses, and for other expenses, two per centum.

For attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, two dollars per day, and the same for each deputy necessarily attending, not exceeding two.

Sec. 2. *And be it further enacted*, That there shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, and in behalf of any prisoner to be tried for a capital offence; for the maintenance of prisoners of the United States confined in jail for any criminal offence; for the commitment or discharge of such prisoners; for the expenses necessarily incurred for fuel, lights, and other contingencies that may accrue in holding the courts within the district, and providing the books necessary to record the proceedings thereof: *Provided*, That the marshal shall not incur an expense of more than twenty dollars in any one year for furniture, or fifty

dollars for rent of building and making improvements thereon, without first submitting a statement and estimates to the Secretary of the Interior, and getting his instructions in the premises.

Sec. 3 *And be it further enacted*, That every district attorney, clerk of a district court, clerk of a circuit court, and marshal of the United States, shall, until otherwise directed by law, upon the first days of January and July in each year, commencing with the first day of July next, or within thirty days from and after the days specified, make to the Secretary of the Interior, in such form as he shall prescribe, a return in writing, embracing all the fees and emoluments of their respective offices, of every name and character, distinguishing the fees and emoluments received or payable under the bankrupt act, from those received or payable for any other service; and in the case of a marshal, further distinguishing the fees and emoluments received or payable for services by himself personally rendered, from those received or payable for services rendered by a deputy; and also distinguishing the fees and emoluments so received or payable for services rendered by each deputy, by name, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive; and also embracing all the necessary office expenses of such officer, together with the vouchers for the payment of the same for the half year ending on the said first day of January or July, as the case may be, which return shall be, in all cases, verified by the oath of the officer making the same. And no district attorney shall be allowed by the said Secretary of the Interior to retain of the fees and emoluments of his said office, for his own personal compensation, over and above his necessary office expenses, the necessary clerk hire included, to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, and at and after that rate for such time as he shall hold the office; and no clerk of a district court, or clerk of a circuit court, shall be allowed by the said Secretary to retain of the fees and emoluments of his said office, or, in case both of the said clerkships shall be held by the same person, of the said offices, for his own personal compensation, over and above the necessary expenses of his office and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars per year for any such district clerk, or circuit clerk, or at and after that rate for such time as he shall hold the office: *Provided*, That when the compensation of any clerk shall be less than five hundred dollars per annum, the difference, ascertained and allowed by the proper accounting officer of the treasury, shall be paid to him therefrom; and no marshal shall be allowed by the said Secretary to retain of the fees and emoluments of his office, for his own personal compensation, over and above a proper allowance to his deputies, which shall in no case exceed three-fourths of the fees and emoluments received as payable for the services rendered by the deputy to whom the allowance is made, and may be reduced below that rate by the said Secretary of the Interior whenever the return shall show that rate of allowance to be unreasonable, and over and above the necessary office expenses of the said marshals, the necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, or at and after that rate for such time as he shall hold the office; and every such officer shall, with each such return made by him, pay into the treasury of the United States, or deposit to the credit of the treasurer thereof, as he may be directed by the Secretary of the Interior, any surplus of the fees and emoluments of his office, which his half-yearly return so made as aforesaid shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained

and paid by him. And in every case where the return of any such officer shall show that a surplus may exist, the said Secretary of the Interior shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officers of his department, and an account to be opened with such officer in proper books to be provided for that purpose, and the allowances for personal compensation for each calendar year shall be made from the fees and emoluments of that year, and not otherwise: And *provided, further*, That nothing in any existing law of Congress authorizing the payment of a per diem compensation to a district attorney, clerk of a district court, or clerk of a circuit court, or marshal, or deputy marshal, for attendance upon the district or circuit courts during their sittings, shall be so construed as to authorize any such payment to any one of those officers for attendance upon either of those courts while sitting for the transaction of business under the bankrupt law merely, or for any portion of the time for which either of the said courts may be held open or in session by the authority conferred in that law; and no such charge in an account of any officer shall be certified as payable, or shall be allowed and paid out of the money hereinbefore appropriated for defraying the expenses of the courts of the United States; and no per diem or other allowance shall be made to any such officer for attendance at rule days of the circuit or district courts; and when the circuit and district courts sit at the same time no greater per diem or other allowance shall be made to any such officer than for an attendance on one court

The two last provisos of paragraph one hundred and sixty-seven of the civil and diplomatic appropriation act, approved May the eighteenth, one thousand eight hundred and forty-two, which require clerks to certify accounts, and confine the marshals, clerks, and district attorneys of the northern and southern districts of New York to the fees allowed by the State law to clerks, attorneys, counsellors, and sheriffs, for similar services in the State courts, are hereby repealed.

Commissioners' Fees.

For administering an oath, ten cents; taking an acknowledgment, twenty-five cents.

For hearing and deciding on criminal charges, five dollars per day for the time necessarily employed.

For attending to a reference in a litigated matter in a civil cause at law, in equity, or in admiralty, in pursuance of an order of court, three dollars per day.

For taking and certifying depositions to file, twenty cents for each folio of one hundred words, and ten cents per folio for each copy of the same furnished to a party on request.

For issuing any warrant or writ, or any other service, the same compensation as is allowed to clerks for like services

For issuing any warrant under the tenth article of the treaty of the ninth of August, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any of the crimes or offences set forth in said article, two dollars; and the same sum for any warrant issued under the provisions of the convention for the surrender of criminals between the United States and the King of the French, concluded at Washington on the ninth of November, eighteen hundred and forty-three; and for hearing and deciding upon the case of any person charged with any offence or crime, and arrested under the provisions of said treaty or convention, five dollars per day for the time necessarily employed.

Witnesses' Fees.

For each day's attendance in court, or before any officer pursuant to

law, one dollar and fifty cents, and five cents per mile for travelling from his place of residence to said place of trial or hearing, and five cents per mile for returning. When a witness is subpœnaed in more than one cause between the same parties in different suits at the same court, but one travel fee and one per diem compensation shall be allowed for attendance, to be taxed in the first case disposed of, and " per diem " only in the other causes, to be taxed from that time in each case in the order in which they may be disposed of.

When a witness is detained in prison for want of security for his appearance, he shall be entitled to a compensation of one dollar per day over and above his subsistence.

When a clerk or other officer of the United States shall be sent away from his place of business as a witness for the Government, either with or without papers or books, his salary shall continue; his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid, but no mileage nor other compensation shall in any case be allowed.

There shall be paid to such seaman or other person as has been or shall be sent to the United States from any foreign port, station, sea, or ocean, by any United States minister, chargé d'affaires, consul, commander, or captain, to give testimony in any criminal case which has been or may be depending in any court of the United States, such compensation as the court which had or shall have cognizance of the crime shall adjudge to be right and proper, not to exceed one dollar for each day the said seaman or person has been or shall be necessarily on the voyage, and arriving at the place of examination or trial exclusive of sustenance or transportation; the court to take into consideration, in fixing said compensation, the condition of said seaman or witness, whether his voyage has been broken up to his injury by his being sent to the United States or not.

If said seaman or person has been or shall be transported in an armed vessel of the United States, no charge for sustenance or transportation shall be made; if in any other vessel, the court may adjudge what compensation shall be paid to the captain of said vessel, and the same shall be paid accordingly: *Provided*, That in no case shall transportation and subsistence be allowed at a rate exceeding fifty cents per diem.

Jurors' Fees.

For actual attendance at any court or courts, two dollars per day during such attendance.

For travelling from their residence to said court or courts, five cents per mile for going, and the same for returning.

Printers' Fees.

For publishing any statute, notice, or order required by law, or the lawful order of any court, department, bureau, or other person, in any newspaper, forty cents per folio for the first insertion, and twenty cents per folio for each subsequent insertion. That the compensation herein provided shall include the furnishing lawful evidence, under oath, of publication, to be made and furnished by the printer or publisher making such publication.

The term folio in this act shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio, but not when there are less, except when the whole statute, notice or order, contains less than fifty words.

The bill of fees of clerk, marshal, and attorneys, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where, by law, costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment

or decree against the losing party; such taxed bill shall be filed with the papers in the cause.

In cases where the United States are parties, the marshal shall, on the order of the court, to be entered in its minutes, pay to the jurors and witnesses all such fees as they may appear by such order to be entitled to, which sums shall be allowed him at the treasury in his accounts.

The fees of the marshals, clerks, commissioners, and district attorneys, in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the treasury, such accounts to be made out and verified by the party under oath, and forwarded to the First Auditor of the Treasury.

In prize cases, where there is a condemnation and sale, the costs, so far as they are payable and can be paid out of the proceeds of sale, shall be paid on the order of the court upon the filing of the taxed bills, making them a portion of the record in the case.

No district attorney, marshal, or clerk, or their deputies, shall receive any other or greater compensation for any services rendered by him than is provided in this act; and all acts and part of acts allowing to either of them any other or greater fees than is herein provided, are hereby repealed, and to receive any other or greater compensation is hereby declared to be a misdemeanor; and if any officer hereinbefore mentioned, or his deputy, shall, by reason or color of his office, wilfully and corruptly demand and receive any other or greater fees than those allowed in this act, he shall, on conviction thereof in any court of the United States, forfeit and pay a fine not exceeding five hundred dollars, and be imprisoned not exceeding six months, at the discretion of the court before whom the conviction shall be had.

But this shall not be construed to prohibit the payment of any salary authorized by statute: *Provided*, That in the State of California and the Territory of Oregon, officers, jurors and witnesses, shall be allowed for the term of two years double the fees and compensation allowed by this act, and the same fees allowed by this act, with fifty per cent. added thereto, for two years thereafter.

That before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or some other person having a knowledge of the facts, to be attached to such bill and filed therewith, that the services charged therein have been actually and necessarily performed as therein stated.

That witnesses who are required to attend any term of the court on the part of the United States shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave of the court or district attorney, under which it shall be their duty to appear before the grand jury or petit jury, or both, as they shall be required by the court or district attorney; no writ shall be necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fee shall be charged by the clerk or the marshal.

Sec. 4. *And be it further enacted*, That if any person shall falsely take an oath or affirmation in relation to any matter authorized by this act, such person shall be deemed guilty of perjury, and upon conviction thereof shall suffer the pains and penalties in that case provided.

Sec. 5 *And be it further enacted*, That all laws and regulations heretofore made which are incompatible with the provisions of this act, are hereby repealed and abrogated: *Provided, nevertheless*, That this act shall

not be construed to repeal or modify any clause or provision of an act approved the eighteenth September, eighteen hundred and fifty, entitled "An act to amend, and supplementary to, the act entitled 'An act respecting fugitives from justice, and persons escaping from the service of their masters,'" approved February twelfth, seventeen hundred and ninety-three.

Sec. 6. *And be it further enacted*, That the act approved September twenty-eighth, eighteen hundred and fifty, entitled "An act to provide for extending the laws and judicial system of the United States to the State of California," be so amended as to confer on the district court of the State of California jurisdiction in all criminal cases as fully and completely as is conferred by law upon the district or circuit court of the State of New York.

Approved, February 26, 1853.

Notices of New Books.

LAW'S UNITED STATES COURTS. The Jurisdiction and Powers of the United States Courts, and the Rules of Practice of the Supreme Court of the United States, and of the Circuit and District Courts in Equity and Admiralty, with Notes and References; and an Appendix, containing the Orders of the High Court of Chancery of England in force in 1842, and the new Orders of the same Court of 1845, and the times and places of holding the United States Courts. By STEPHEN D. LAW, Counsellor of the Supreme Court of the United States. 1 vol. 8vo. pp. 815. Albany: Little & Co. 1852.

THIS is an industrious and useful collection of the constitutional and statute provisions of the United States, in relation to the jurisdiction and powers of the several United States Courts in the States and Territories, with full notes of the decisions of the courts upon the several provisions thereof. The author has done wisely in giving as near as possible the words of the statutes, and the exact language of the court. He has thus made a valuable handbook of reference, which was much needed, and which no other publication supplied. The court rules which are given, as the title indicates, add to the value of the book. The new rules and orders of the High Court of Chancery in England, consequent upon the organic changes in its practice made by the last Parliament, make the contents of the Appendix of this volume a matter of curiosity, rather than of use.

We have noticed that the volume has received the commendation of the Chief Justice of the Supreme Court of the United States, and of several of the Associate Justices, as a "useful book, well arranged and well executed, and much needed in the profession."

We must also speak most highly of the singular beauty of the mechanical part of the book. The paper is excellent, the type large and clear, — so that it is a relief to look upon it.

THE PUBLIC STATUTES AT LARGE OF THE STATE OF OHIO, from the close of Chase's Statutes, February, 1833, to the present time; arranged in chronological order. With reference to the Judicial Decisions construing those Statutes. And a Supplement, containing all laws passed prior to February, 1833, which are now in force. Edited by MASKELL E. CURWEN, of the Cincinnati Bar; one of the Professors of Law in the Cincinnati College. In three volumes. Vol. I. 8vo. pp. 852. Cincinnati: Published by the Author. 1853.

We have examined with considerable care the first volume of Mr. Curwen's edition of the Public Statutes of Ohio, which is the only volume yet published; and we have been exceedingly pleased with it. The title, given above, explains the plan of the work, and gives an idea, though an inadequate one, of the contents of the volumes. Thus, there is an excellent treatise upon the interpretation of statutes, and on the repeal of statutes, with the constitutional and statutory provisions of Ohio upon these subjects, which is not mentioned in the title-page; the Constitution of the United States; and the present Constitution of Ohio, — that of 1851, — would of course be given. We think Mr. Curwen has done wisely in adding the Constitution of 1802, and the famous Ordinance of Congress of 1787. We like also his printing with the volume, the Laws of the United States of chief interest to the people of that State. He has given the Federal laws relating to fugitives from justice and labor; to naturalization; to notaries public; the conveyance of vessels; and the authentication of statutes, records, &c. These will be of the greatest convenience to those who have not complete editions of the Laws of the United States.

But the chief merit of the book is the scrupulous care and fidelity with which the volume seems to have been prepared. The marginal abstracts of the sections are faithfully as well as succinctly made; the notes of judicial decisions upon the several statutes are brief but clear, and embrace all the leading cases; the references from one statute to others upon the same subject-matter are exact; in a word, the volume appears to be one in the accuracy of which the fullest reliance may be placed.

We must regret that the Legislature of Ohio have not provided for a revision of their statutes. As the title to the book indicates, the statutes of the several years are to be given from 1833 to the present date, and before 1833 back to the earliest legislative enactment. Three volumes are thus to be filled, with what would not occupy more than one-third of the space, had such a revision been made. But this is the fault of the Legislature, and it renders Mr. Curwen's volume the more necessary, and makes his labors the more acceptable. With the full and carefully prepared indexes — the state of the Statute Law of Ohio, upon any subject, can be readily ascertained.

We cannot better indicate the care bestowed in securing, not only the completeness, but also the mechanical accuracy of the work, than by quoting the concluding paragraph of the preface. "The editor has borne constantly in mind that his performance must undergo the severe trial of daily use by an intelligent profession, who will not fail to test its accuracy and thoroughness, and to discover all its defects. No reference has been made without repeated examinations. The proof-sheets of every page have been twice compared with the text of the official edition, by accurate proof-readers, and attentively examined by the editor before it was printed; and the errors which actual use may disclose, are not attributable either to haste or to carelessness, or to indifference to their importance."

New Publications received.

THE LAW OF COMMANDATARY OR LIMITED PARTNERSHIP in the United States. By Francis J. Troubat, of the Bar of Philadelphia. 1 vol. 8vo. pp. 728. Philadelphia: James Kay, Junior, & Brother. 1853.

THE JURISDICTION AND POWERS OF THE UNITED STATES COURTS, and the Rules of Practice of the Supreme Court of the United States, and of the Circuit and District Courts in Equity and Admiralty, with notes and references and an appendix; containing the orders of the High Court of Chancery of England in force in 1842, and the new orders of the same Court in 1845, and the times and places of holding the United States Courts. By Stephen D. Law, Counsellor of the Supreme Court of the United States. 1 vol. 8vo. pp. 845. Albany: Little & Company. 1852.

ENGLISH LAW AND EQUITY REPORTS, Vol. XI. pp. 661; containing Cases in all the Courts of Equity and Common Law during the year 1852. Boston: Little, Brown & Co. 1853.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Ball, Homer J.	Worcester,	Feb. 25,	Henry Chapin.
Bintnall, James	Malden,	" 14,	Asa F. Lawrence.
Brown, Samuel J.	Chelsea,	" 9,	Frederic H. Allen.
Burt, Reuben W.	Boston,	" 16,	Bradford Sumner.
Cooley, Merrick B. et al.	Greenfield,	" 17,	D. W. Alvord.
Cooper, Edward M.	Charlestown,	" 21,	Frederic H. Allen.
Cutter, Connel B.	Amherst,	" 17,	John Dickinson.
Dearing, Thomas Haven	Lynn,	" 26,	John G. King.
Dunbar, Isaac A.	East Bridgewater,	March 7,	Perez Simmons.
Dyar, John F.	Cambridge,	Feb. 3,	Asa F. Lawrence.
Felbee, Julius	Boston,	" 4,	John M. Williams.
Francis, Ephraim	Taunton,	" 15,	E. P. Hathaway.
Fuller, Eustis P.	Grafton,	" 3,	Henry Chapin.
Gilchrist, James R.	Malden,	" 17,	Asa F. Lawrence.
Goodwin, John	Worcester,	" 19,	Henry Chapin.
Hall, Albina et al.	Lawrence,	" 10,	Daniel Saunders, Jr.
Hart, John C.	New Bedford,	" 23,	E. P. Hathaway.
Hicks, Samuel G.	North Bridgewater,	" 4,	Perez Simmons.
Hill, Charles A.	Charlestown,	" 5,	Asa F. Lawrence.
Hobart, Thomas	Hingham,	March 11,	Perez Simmons.
Hoyt, Azor	Greenfield,	Feb. 17,	D. W. Alvord.
Jauvrin, John	Newburyport,	" 21,	Daniel Saunders, Jr.
Judd, Zabina	Lawrence,	" 10,	Daniel Saunders, Jr.
Keith, Lucius A.	North Bridgewater,	Jan. 27,	Perez Simmons.
Lawrence, William C.	Boston,	Feb. 14,	Bradford Sumner.
Leonard, John S.	Boston,	" 4,	Frederic H. Allen.
Lyford, James	Boston,	" 4,	John M. Williams.
Merrill, Alvan	Danvers,	" 22,	John G. King.
Richardson, Amos H.	Boston,	" 3,	Frederic H. Allen.
Rogers, Charles A. et al	Greenfield,	" 21,	D. W. Alvord.
Seaverns, George W.	Salem,	" 25,	John G. King.
Stevens, Joseph R.	Gloucester,	" 28,	John G. King.
Titcomb, Samuel B.	Boston,	" 28,	Bradford Sumner.
Welch, Samuel	Danvers,	" 26,	John G. King.
Wildes, Solomon L.	Boston,	" 24,	John M. Williams.